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CASE NO. 92-338

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

COOPER TIRE & RUBBER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO NEW ISSUES PRESENTED BY RESPONDENT

INTRODUCTION

The petitioner, Cooper Tire & Rubber Company ("Cooper")[1], has requested this Court to issue a Writ of Certiorari to review and reverse a decision of the United

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[1]Pursuant to Rule 29.1 of this Court's rules, Cooper states that there is no parent or subsidiary company of Cooper to be listed in this brief.

States Court of Appeals for the Fifth Circuit, which adopted *sub silentio*, the *Daylin* doctrine of the National Labor Relations Board, *Daylin, Inc.*, 198 NLRB 281 (1972), *enf'd* other grounds, 496 F.2d 484 (6th Cir. 1973). *Daylin* holds that if an employer maintains a no-solicitation rule prohibiting solicitation on behalf of a union and the rule is overly broad, an employee who violates what would otherwise be the valid part of the rule (*i.e.* soliciting while "on the clock" at the work station), is nevertheless protected because the rule is invalid. Petitioner contends that if an employee is engaged in union solicitation when she should be working, her activity is not protected in any manner by the National Labor Relations Act.

The Board, in opposition to the petition for Writ of Certiorari, contends that (1) the *Daylin* issue is not properly before this Court because it was not argued before the Board; (2) because of the disparate enforcement of the rule, the employee in question, Mitzi Rye, was improperly discharged; and (3) Rye did not violate even the valid part of the rule.

This brief will respond to each of the three Board contentions.

ISSUES TO BE ADDRESSED

1. Respondent, National Labor Relations Board ("Board" or "NLRB"), contends that petitioner failed to challenge, before the Board, the validity of the *Daylin* doctrine, and accordingly this Court lacks jurisdiction to consider petitioner's claim. Resp. Br. in Opp., pg. 12.

2. The Board contends that ". . . [T]he evidence showed that company officials had disregarded many instances of solicitation that violated its no-solicitation policy where the solicitation was unrelated to union activity." Resp. Br. in Opp., pg. 10.

3. The Board contends that Rye's discussions with co-workers about the Union, which led to her suspension and discharge, did not occurr during working time. Resp. Br. in Opp., pg. 13.

A. Challenge to *Daylin* Doctrine

1. The issue of the invalidity of the *Daylin* doctrine is properly before this Court, because, contrary to the Board's assertion, it *was* raised before both the ALJ and the Board. In Cooper's Brief to the ALJ, at page 84, note 39, (Reply Brief App., pg. 2) petitioner stated,

> 39. Board precedent stands for the proposition that a discharge is presumptively unlawful if made pursuant to an overly broad no-solicitation rule, even when the employee has engaged in solicitation which occurs during an employee's work time. **Cooper disagrees with *Daylin, Inc.* and *J.L. Hudson* and its progeny to the extent that such cases suggest that the discharge of an employee, who violates the valid part of an overly broad no-solicitation rule is invalid.** (Emphasis added).

2. In its Exceptions to the Decision of the Administrative Law Judge, filed with the Board, Cooper, at Exception Number 107 (Reply Brief App., pg. 3), excepted to the ALJ's failure to find that "a discharge is valid if made pursuant to the valid part of an invalid no-solicitation rule." See, 29 C.F.R. §102.46(b)(2) (Reply Brief App., pg. 1)

3. Similarly, in its brief to the Board in support of its exceptions to the ALJ's Decision, Cooper, at page 39 (Reply Brief App., pg. 4), stated "Cooper was entitled to discipline Pickering and Rye for soliciting employees on work time, regardless of whether its rule is deemed to be invalid." This statement in support of Exception 107 is directly in conflict with the *Daylin* doctrine, and thus placed the issue before the Board.

The test for compliance with §10(e) of the Act, 29 U.S.C. 160(e) is whether or not the objection was such as would apprise the Board that petitioner intended to press the question now presented. *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943). Clearly, the exception to the ALJ's decision was not so ambiguous as to be totally ineffective to adequately apprise the Board of Cooper's intentions. *NLRB v. Best Products Co., Inc.*, 765 F.2d 903, 909 (9th Cir. 1985). When a recent decision of the Board was remanded by the 6th Circuit, the Board on remand stated: "The Court found that Respondent timely raised its . . . argument in its brief in support of exceptions to the ALJ's decision." *Camvac International*, 297 NLRB 853 (1990).

Based on the foregoing, the request to this Court to overturn the *Daylin* doctrine is properly before the Court.

B. Disparate Treatment of Rule Violators

1. As stated above, the Board in its Brief in Opposition contends that the evidence showed that Cooper disregarded many instances of violations of the no-solicitation rule, where the solicitation was not related to union activity. However, the ALJ, at Pet. App. A69-70, held,

> ". . . I cannot infer or **find** that the interpretation and **enforcement** of the [no-solicitation] rule shows by a preponderance of the evidence that the rule was so interpreted or enforced as to show disparate treatment toward the rights of employees under Section 7 of the Act." (Emphasis added)

2. While the ALJ, and thus the Board, stated at Pet. App. A82, "there seems to be disparate enforcement of the rule", the phrase "seems to be" cannot override the specific **finding** at Pet. App. A69 that there was no disparate enforcement. Thus, the statement of the Court of Appeals at Pet. App. A21, holding that the Board's "finding of disparate enforcement . . . [is] supported by substantial evidence" is contrary to the Board's decision.

C. Rye's Union Activity Occurred on Working Time

1. The Board contends in its brief in opposition that Rye's discussions with co-workers about the union had not occurred during working time. Resp. Br. in Opp., pg. 13. However, the ALJ, at Pet. App. A(84) found that on at least one day in question, the discussion and union card distribution took place while Rye had stopped working, was still at her machine and still on the clock. The Court of Appeals in its modified order found that:

> "Cooper need not amend its no-solicitation rule to permit solicitation in actual working areas, i.e., in the immediate areas surrounding continuously operating machines." Pet. App. A14, n. 11.

Since it is undisputed that Rye was on the clock in an actual work area when she solicited a fellow employee who was also in the same immediate area (Pet. App. A83-84), she unquestionably violated the valid part of the rule. The rule does not require that production be stopped by the violation, or even that there be substantial interference with production -- all that is required is that a solicitation take place in a prohibited area or at a prohibited time. That was proven beyond a reasonable doubt.

2. Contrary to the Board's assertion at page 9 of its Brief in Opposition, the Fifth Circuit did, in fact, apply the *Daylin* doctrine in reaching its decision below. In

looking at the length of Mitzi Rye's work-time conversations with employees about the union, and the actual or potential interference with production caused by her work-time solicitation (Pet. App. A20), the Court was applying the *Daylin* doctrine even though the Court did not acknowledge that it was doing so. The Court delved into the question of production interference because of the *Daylin* doctrine. *Daylin* provides for lawful discharge for violation of an invalid rule only if the employer can show interference with production by the solicitor or solicitee. If the rule had been valid, and if Rye had violated the rule, then production interference would not be an issue. The Court examined the work interference issue to comply with *Daylin*.

Thus, contrary to the Board's contention, the Court did apply the *Daylin* doctrine, and the issue is properly before this Court.

CONCLUSION

Scores of cases annually flood the Board and Court dockets regarding the application of no-solicitation rules. This very important issue of whether the *Daylin* doctrine (1) improperly shifts to the employer the burden of proving that it did not violate the NLRA; and (2) provides protection under the NLRA to unpro-

tected activity, should now be addressed by this Court to give guidance to both the Board and the public as to the expected level of conduct.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

29 C.F.R. §102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

(b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

IN THE UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COOPER TIRE & RUBBER COMPANY	)	CASE NOS. 26-CA-12639
	)	26-CA-12711
and	)	
	)	
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, CLC	)	

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

. . . . .

39. Board precedent stands for the proposition that a discharge is presumptively unlawful if made pursuant to an overly broad no-solicitation rule, even when the employee has engaged in solicitation which occurs during an employee's work time. **Cooper disagrees with *Daylin, Inc.* and *J.L. Hudson* and its progeny to the extent that such cases suggest that the discharge of an employee, who violates the valid part of an overly**

broad no-solicitation rule is invalid. (Emphasis added).

IN THE UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
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COOPER TIRE &	)	
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	)	26-CA-12711
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	)	
UNITED RUBBER,	)	
CORK, LINOLEUM	)	
AND PLASTIC WORKERS	)	
OF AMERICA,	)	
AFL-CIO, CLC	)	

RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE

. . . . .

107. The ALJ's failure to find that a discharge is valid if made pursuant to the valid part of an invalid no-solicitation rule.

. . . . .

IN THE UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

. . . . .

2. Cooper Lawfully Suspended Rocky Pickering And Discharged Mitzi Rye Because Their Solicitations During Work Time Impaired Productivity

Cooper was entitled to discipline Pickering and Rye for soliciting employees on work time, regardless of whether its rule is deemed to be invalid.

. . . . .